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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

Petition for Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
JANET A. METCALF
Assistant Attorney General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioners

***Counsel of Record**

QUESTIONS PRESENTED

1. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims brought under Title II of the Americans with Disabilities Act, and based on alleged disability discrimination and not on the deprivation of any fundamental right, a valid exercise of its authority under section 5 of the Fourteenth Amendment?

2. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims brought under Section 504 of the Rehabilitation Act a valid exercise of its authority under section 5 of the Fourteenth Amendment?

3. The Court has made it clear that State Eleventh Amendment immunity is constitutionally protected and that waivers of constitutionally protected rights must be knowing and voluntary. The Court also has noted, however, that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking actions that Congress could not otherwise require them to take, including, perhaps, waiving their Eleventh Amendment immunity. Under Section 504 of the Rehabilitation Act, Congress expressly has conditioned the States' acceptance of federal funds on the States' waiver of Eleventh Amendment immunity. For the waiver to be valid, must a State knowingly and voluntarily agree to waive, by its acceptance of federal funds, its constitutionally protected sovereign immunity, or is it sufficient that Congress clearly express its intent to require waiver as a condition for receipt of federal funds?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, two Oregon correctional facilities, the Columbia River Correctional Institution and the Santiam Correctional Institution, respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Phiffer v. Columbia River Correctional Inst.*, 384 F.3d 791 (9th Cir. 2004).[1]

OPINIONS BELOW

The district court's opinion and order was not reported and is attached to this petition. App. 6. This case has twice been before the Ninth Circuit. That court's latest decision was rendered after this Court granted the state petitioners' petition for certiorari, and vacated and remanded the case for further consideration in light of *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). *Columbia River Correctional Institute, et al. v. Phiffer,* ___ U.S. ___, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004). This Court's memorandum decision, granting certiorari, and vacating and remanding, is attached to this petition. App. 22.

On remand, the Ninth Circuit simply "reissued [its] original disposition in per curiam form without further amendment," except for the addition of a concurring opinion authored by Judge O'Scannlain. *Phiffer v. Columbia River Correctional Inst.,* 384 F.3d at 792, 793. The court's per curiam

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[1] Consistent with plaintiff's complaint, the Ninth Circuit Court of Appeals case title identifies the two state correctional facilities as being "institutes." In fact, however, they are "institutions." *See, e.g.,* Or. Admin. R. 291-139-0015(2)(b)(A) (regarding inmate legal assistants in the various correctional institutions, including Columbia River and Santiam); Or. Admin. R. 291-139-0025(2) (regarding law libraries at the Columbia River and Santiam Correctional Institutions).

opinion and the concurring opinion are attached. App. 2, App. 4. The Ninth Circuit Court of Appeals' first decision in this case was not reported and it also is attached to this petition. App. 19.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals' per curiam opinion was filed on September 13, 2004. It was amended on September 21, 2004 to add Judge O'Scannlain's concurring opinion. On December 7, 2004, Justice O'Connor granted petitioners an extension of time to file this petition for a writ of certiorari, to and including January 11, 2005. This petition is filed within the extension period granted by the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." United States Constitution art. I, § 8, cl. 1.

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title II of the Americans with Disabilities Act of 1990 provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such dis-

> ability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Title II further provides:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].

42 U.S.C. § 12133.

Congress purported to abrogate the States' Eleventh Amendment immunity to damages claims brought under Title II as follows:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202

> The Rehabilitation Act provides in part that:
>
> (a) No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of his or her disability, be excluded from the participation in, be

> denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *
>
> (b) For the purposes of this section, the term "program or activity" means all of the operations of —
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> * * * * *
>
> any part of which is extended Federal financial assistance.

29 U.S.C. § 794. The Act further provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

29 U.S.C. § 794a(2).

Congress purported to abrogate the States' Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a) as follows:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section

504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794] * * *.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

Plaintiff is a resident of Texas.[2] From July to November 1997 and from April to December 1998, plaintiff was incarcerated in Oregon's Santiam Correctional Institution. From 1997 to April 1998, he was incarcerated in Oregon's Columbia River Correctional Institution. While at Columbia River, plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March through December 1998, during which time he was returned to the Santiam facility. Both the Transitional Mental Health Program and the Pathfinders Program are funded, in whole or in part, by the federal government.

Plaintiff claims that, during his incarceration, he suffered from osteoarthritis and osteoporosis. The Pathfinders Program met for three hours a day, five days per week. As a result of his disability, plaintiff was unable to sit for that period of time. He asked corrections officials at both the Santiam and Columbia River facilities to return him to the Transitional Mental Health Program or, alternatively, for a reasonable ac-

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[2] This description of the facts is taken from plaintiff's complaint. Because the district court was ruling on the State's Motion for Judgment on the Pleadings, it accepted the plaintiff's allegations as true and drew all inferences in favor of the plaintiff. App. 7.

commodation of his disabilities. The corrections officials denied his requests. As a result, he allegedly suffered severe physical pain while enrolled in the Pathfinders Program. Plaintiff contends that the state defendants could have made reasonable modifications to allow him to participate in a program that would have accommodated his disabilities, but that they failed to do so. He also alleged that the defendants were deliberately indifferent to the strong likelihood that their action or inaction was in violation of his federally protected rights.

In his complaint, plaintiff asserted three claims, one brought under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, one brought under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and one alleging a claim of negligence under the state Tort Claims Act, Or. Rev. Stat. § 30.265. In their amended answer, the state defendants relied, in part, on a claim of Eleventh Amendment immunity to plaintiff's Title II and Section 504 claims. Subsequently, the defendants filed a motion for judgment on the pleadings, relying on the claim of Eleventh Amendment immunity.

The district court denied the state defendants' motion. The district court held that, "as a matter of current law in th[e] circuit, * * * Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment." App. 16. The court noted the Ninth Circuit's holding that "Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was 'validly enacted under the Fourteenth Amendment.'" App. 17. The court also concluded, based on the Ninth Circuit's case law, that "Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate the[] [pertinent] state programs." App. 17.

For that reason, the court denied defendants' motion for judgment on plaintiff's Section 504 claims. App. 18.

The state defendants appealed. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (order denying motion to dismiss that is based on a claim of Eleventh Amendment immunity is subject to interlocutory appeal). On the merits of the state defendants' claim to immunity from suit brought under Title II of the ADA, the Ninth Circuit Court of Appeals acknowledged the State's "valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), requires us to revisit our precedent[.]" App. 20. But the court noted that it had "already done so and ha[d] already rejected the State's claim." App. 20, citing *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), and *cert. dismissed* 538 U.S. 958 (2003); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002); and *Lovell v. Chandler*, 303 F.3d 1039, 1050–51 (9th Cir. 2002), *cert. denied* 537 U.S. 1105 (2003). The court "decline[d] further review of [its] settled precedent." App. 21.

With regard to the state defendants' claim to immunity from suit based on Section 504 of the Rehabilitation Act, the Ninth Circuit held that its "precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds." App. 21, citing *Douglas v. Cal. Dept of Youth Auth.*, 271 F.3d 812, 820, *as amended*, 271 F.3d 910 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002). The court rejected the state defendants' argument that intervening precedent from this Court, specifically *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675–76 (1999), had "undermine[d]" the Ninth Circuit's "Eleventh Amendment waiver jurisprudence." App. 21.

"Once again," the court noted, it had "already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds." App. 21, citing *Vinson v. Thomas,* 288 F.3d 1145, 1151 (9th Cir. 2002), *cert. denied sub nom Hawaii v. Vinson*, 537 U.S. 1104 (2003); *Lovell,* 303 F.3d at 1051. The Ninth Circuit thus affirmed the district court's decision and remanded. App. 21.

The state defendants filed a petition for certiorari in this Court. *Columbia River Correctional Institute, et al. v. Phiffer*, No. 03-279. In their petition, the defendants noted that this Court had granted certiorari in *Tennessee v. Lane* (02-1667), that the circuits were deeply divided over whether Congress had validly abrogated the States' sovereign immunity for claims for damages brought under Title II of the ADA, and that review in *Tennessee v. Lane* might provide the Court with the opportunity to resolve that circuit split, although "the opportunity to address the question ha[d previously] proved illusive." The state defendants also asked this Court to determine whether Congress's purported abrogation of the States' Eleventh Amendment immunity from damage claims brought under section 504 of the Rehabilitation Act was a valid exercise of its authority under section 5 of the Fourteenth Amendment, and to decide whether a State's waiver of its immunity when it accepts federal funds under section 504 must be knowing and voluntary to be effective.

As discussed in more detail below, *Tennessee v. Lane* did not decide the broader issue of whether Congress validly abrogated States' sovereign immunity to damage claims brought under Title II of the ADA. Instead, the Court decided a narrower issue, and "conclude[d] that Title II, *as it applies to the class of cases implicating the fundamental right of access to the courts,* constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." 541 U.S. at ___, 158 L. Ed. 2d at 844 (emphasis

added). Although *Lane* did not decide the Title II abrogation issue presented in this case, this Court granted the state defendants' petition for certiorari, and vacated and remanded to the Ninth Circuit "in light of" *Lane.* 158 L. Ed. 2d at 960.

On remand, and "[u]pon due consideration," the Ninth Circuit simply "conclude[d] that [its] initial resolution of this case is consistent with *Lane*'s holding, and [the court] reissue[d] [its] original disposition in per curiam form without further amendment." *Phiffer*, 384 F.3d at 792. Judge O'Scannlain concurred. Although he "agree[d] that circuit precedent control[led] the outcome of this case," he wrote "separately to stress that, even after *Tennessee v. Lane* * * *, a palpable tension continues to exist between [that] circuit's sovereign immunity jurisprudence and the Supreme Court's guidance on this issue." *Id.* at 793 (O'Scannlain, J., concurring) (citations omitted). Judge O'Scannlain described the discrepancy between this Court's "circumspect" and "exacting" analysis and the Ninth Circuit's refusal to engage in a "nuanced, case-by-case analysis."

> Although the Court held in *Lane* that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity in the context of courthouse access, that narrow holding was reached by a circumspect analysis that is significantly more exacting than that employed by our circuit in *Dare* [*v. California*, 191 F.3d 1167 (9th Cir. 1999), *cert. denied sub nom Cal. DMV v, Dare*, 531 U.S. 1190 (2001)] and *Clark* [*v. California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998)]. [*Lane*, 541] U.S. at ___, 124 S. Ct. at 1994. Indeed, the *Lane* Court placed significant emphasis upon the fact that courthouse access is a fundamental right that implicates not only disabled persons' entitlement to equal protection but also their due process

> rights and their rights under the First and Sixth Amendments. *See id.* at 1988. It is therefore open to question whether Title II validly abrogates state sovereign immunity where no such fundamental right is at issue. *See id.* at 1994 n. 20. A State may well retain its Eleventh Amendment immunity where a plaintiff premises a Title II claim solely upon an alleged equal protection violation and has not suffered the deprivation of any other constitutional right. Because *Dare* and *Clark* upheld the entirety of Title II without engaging in the nuanced, case-by-case analysis demanded by *Lane*, their continued vitality is uncertain. In the absence of en banc review, however, I acknowledge that these decisions remain binding on this panel and thus join in the per curiam opinion.

384 F.3d at 793 (O'Scannlain, J., concurring).

REASONS FOR GRANTING THE WRIT

Review is warranted in this case because the circuits are split on each of the three questions presented and because, with respect to the first issue, *Lane* has done nothing to mend or repair the split. Moreover, each question raises significant issues concerning the States' sovereign immunity and the ability of Congress to abrogate or force a waiver of that immunity.

I. The circuits are split over whether Congress validly abrogated the States' sovereign immunity to damage claims brought under Title II of the ADA; *Tennessee v. Lane* did not resolve that issue except with regard to claims based on certain fundamental rights, such as access to courts; and thus the circuit split remains every bit as wide after *Lane*, as it was before.

Before *Lane*, the circuits were deeply divided over whether Congress in Title II of the ADA validly abrogated the

States' immunity to claims for monetary damages. Four circuits, the Fourth, Fifth, Eighth and Tenth, had held as a general matter that there was no valid abrogation. *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002); *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1077 (2002); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. dismissed* 529 U.S. 1001 (2000). The Ninth Circuit had reached the opposite conclusion. *Hason v. Medical Bd. of California*, 279 F.3d 1167, *reh'g en banc denied*, 294 F.3d 1166 (9th Cir.2002), *cert. dismissed* 538 U.S. 958 (2003).

Two other circuits had rendered less categorical decisions. The Sixth Circuit, in a decision that at least in some respects presaged this Court's decision in *Lane*, held that the States' Eleventh Amendment immunity was validly abrogated in the context of fundamental, due-process-based claims, but not with regard to equal-protection-based claims. *Popovich v. Cuyahoga County Ct. of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*), *cert. denied*, 537 U.S. 812 (2002). The Second Circuit developed an analysis that depended on the state actor's purpose or state of mind. *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001) (abrogation valid only as to cases where Title II violation was motivated by discriminatory animus or ill will directed at disability).

In *Lane*, this Court granted certiorari on the broad question of "[w]hether Title II of the Americans with Disabilities Act * * * exceeds Congress's authority under section 5 of the Fourteenth Amendment, thereby failing to abrogate the states' Eleventh Amendment immunity from private damage claims." The Court answered a narrower question, however, determining that "Title II, *as it applies to the class of cases implicating the fundamental right of access to the courts*, con-

stitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." 158 L. Ed. 2d at 844 (emphasis added). In reaching that decision, the Court relied on the fact that "Title II, like Title I, seeks to enforce [a] prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 836–37 (citations omitted). "These rights include some, like the right of access to the courts at issue in th[at] case, that are protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 837. With regard to the right of access to the courts, "Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing" that right. *Id.* at 842. The decision in *Lane* is, thus, a narrow one. The Court declined to "consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 841 (footnote omitted).

Courts that have considered Title II sovereign immunity issues after *Lane* have remarked on the limited focus of that decision and have held that it does not apply to what might be seen as more garden-variety, disability discrimination claims brought under Title II. *See Miller v. King,* 384 F.3d 1248, 1273 (11th Cir. 2004) ("what makes this case radically different from *Lane* is the limited nature of the [Eighth Amendment] constitutional right at issue and how Title II, as applied to prisons, would substantively and materially rewrite the Eighth Amendment"); *Badillo-Santiago v. Naveira-Merly,* 378 F.3d 1, 5 (1st Cir. 2004) (*Lane* applies only to "certain constitutionally-based claims under Title II of the ADA, on an as-applied basis"); *Haas v. Quest Recovery Services, Inc.,* 338 F. Supp. 2d 797, 801 (N.D. Ohio 2004) (in *Lane,* this Court "made clear that the decision only addressed the right of access to the courts, and not any other application of Title II").

The one exception to the general rule that *Lane* did not alter the previous circuit split is that most, but not all, courts that have considered the continuing viability of the Sixth Circuit's *Garcia* approach -- which depends upon the state of mind or purpose of the state actor -- have held that approach does not survive *Lane*. *Compare Johnson v. Southern Conn. St. Univ.*, 2004 US Dist LEXIS 21084, *11 (D. Conn. 2004) (after *Lane*, there is "no longer any basis to find the existence of a cause of action under Title II where no * * * fundamental right is implicated and the sole justification is the defendant's level of scienter"); *Roe v. Johnson*, 334 F. Supp. 2d 415, 421 n. 9 (S.D. NY 2004) (same), with *Degrafinreid v. Ricks*, 2004 US Dist LEXIS 24448, *17–18 (S.D. NY 2004) (*Lane* did not repudiate or alter *Garcia* analysis).

Thus, *Lane* did little, if anything, to mend the circuit split regarding whether Congress validly abrogated States' sovereign immunity to damage claims brought under Title II when a right other than a fundamental right, like access to courts, is involved. The circuit split persists and is just as wide when claims are based, as they often are, on disability discrimination *per se* and not on any fundamental right.[3] Moreover, because *Lane* does not appear to alter the analysis that applies outside the context of certain fundamental rights, there is no reason to believe that the passage of time and further consideration of the decision in *Lane* will do anything to resolve the circuit split. *Lane* simply does not bear on the broader issue of whether States are immune to damage claims brought under Title II that depend on equal-protection claims of disability discrimination. That broad and significant issue, that contin-

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[3] In this case, respondent's claims are that petitioners unlawfully discriminated against him on the basis of his disability. In his complaint, he does not rely on any fundamental right.

ues to divide the circuits, warrants a grant of certiorari here, just as it did when this Court granted certiorari in *Lane*.

II. The circuits also are divided over whether Congress properly abrogated the States' sovereign immunity to damage claims brought under Section 504 of the Rehabilitation Act.

The Court has refined the analysis that applies when determining whether Congress has validly abrogated the States' Eleventh Amendment immunity to claims for damages. Before *Lane,* the Court's most detailed description of the review that is required was found in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). Except to the extent that it focuses more precisely on the constitutional right that is at issue, the analytical approach used in *Lane* does not represent a departure. 158 L. Ed. 2d at 835–44 (applying analysis outlined in *Garrett* and *City of Boerne v. Flores*, 521 U.S. 507 (1997)). In *Lane,* the Court reiterated that Congress may abrogate the States' Eleventh Amendment immunity only when it "unequivocally expresse[s] its intent to abrogate that immunity" and when "'Congress act[s] pursuant to a valid grant of constitutional authority.'" *Id.* at 833, quoting *Kimel v. Board of Regents,* 528 U.S. 62, 73 (2000). *See also Garrett,* 531 U.S. at 363. In *Garrett*, the Court "held that 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'" *Garrett*, 531 U.S. at 364, quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *Lane* cites the same passage from *Fitzpatrick.* 158 L. Ed. 2d at 833.

In *Lane,* as in *Garrett,* the first step in determining whether Congress validly exercised its authority under section 5 of the Fourteenth Amendment is "to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Id.* at 836, citing *Garrett*, 531 U.S. at 365.

"Once * * * the metes and bounds of the constitutional right in question" have been determined, the next task is to "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled." *Id.* at 368. Even if the legislative history shows "a pattern of discrimination by the States which violates the Fourteenth Amendment," "the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.* at 374. *See also Lane*, 158 L. Ed. 2d at 835 ("Section 5 legislation is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" quoting *City of Boerne*, 521 U.S. at 520).

Not all of the circuits have applied this type of analysis to the question of Congress's authority to abrogate the States' sovereign immunity to claims brought under Section 504 of the Rehabilitation Act. Perhaps as a result, the circuits have reached conflicting conclusions. Most circuits that have addressed the question have found that the purported abrogation exceeds Congress's authority under section 5 of the Fourteenth Amendment. In a pre-*Lane*, pre-*Garrett* case, the Ninth Circuit concluded to the contrary and upheld the abrogation as within Congress's authority. Following *Garrett*, and in this case, following *Lane,* the Ninth Circuit has refused to revisit its prior conclusion, creating a conflict between the circuits that have ruled on the issue.[4] Like the question of Congress's authority to abrogate the States' sovereign immunity to claims brought under Title II of the ADA, the similar question as to claims arising under Section 504 of the Rehabilitation Act is

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[4] Other circuits have found it unnecessary to address this question, because they have concluded that the States waived any immunity they may have had by accepting federal funds, as discussed more fully in the next section.

important and requires this Court's attention to resolve the conflict between the circuits. And, as with the Title II issue, *Lane* has done nothing to resolve the issue or mend the conflict.

The Second, Fifth, Seventh, Eighth and Tenth Circuits have concluded that Congress lacked the authority to abrogate the States' sovereign immunity from claims brought under Section 504 of the Rehabilitation Act. In *Garcia,* the Second Circuit held that Section 504, like Title II of the ADA, exceeds Congress's authority under section 5 of the Fourteenth Amendment. Both provisions fail the requirement that remedies be congruent and proportional to the constitutional violations Congress sought to remedy or deter; both impermissibly shift the burden of proof onto the state to defend the absence of an accommodation that would presumptively be permissible under the Fourteenth Amendment; both require states to eradicate disparate effects divorced from any inquiry into intent. 280 F.3d at 109–110, 113. The court nevertheless concluded that Title II could constitutionally apply to claims alleging violations motivated by discriminatory animus or ill will based on the plaintiff's disability, *Id.* at 111, and that Section 504 could constitutionally apply to claims alleging deliberate indifference to the rights secured to the disabled by the act, *Id.* at 115.[5]

The Fifth Circuit similarly held that Title II of the ADA exceeded Congress's authority to abrogate States' sovereign immunity, and applied the same analysis to Section 504. *Reickenbacker v. Foster*, 274 F.3d at 977 n 17, 982–83. For Section 504, the court concluded that Congress failed to iden-

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[5] As noted above, the Second Circuit's focus on scienter may be suspect following *Lane,* which takes a more rights-based approach. The lack of congruence and proportionality and the shift in the burden of proof remain valid rationales, however.

tify a history and pattern of unconstitutional discrimination by the States against the disabled and that the provision imposed obligations on the States to make accommodations that exceed constitutional boundaries. *Id.*

In *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000), the Seventh Circuit concluded, with little analysis, that Congress lacked the authority to abrogate the States' sovereign immunity because the ADA rests on the Commerce Clause and the ADA and Rehabilitation Act are identical for purposes of § 5.

The Eighth Circuit reviewed the legislative history of Section 504 and found "little indication that Congress properly identified constitutional transgressions it sought to remedy by enacting § 504. In fact, the legislative history is largely silent regarding the reason § 504 was included in the [Rehabilitation Act]." *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745, 755 (8th Cir. 1999).[6] "Similarly, the legislative history of the abrogation provision does not identify constitutional transgressions that make such a provision appropriate. The legislative history of § 2000d–7 instead reveals only that Congress sought to override the Supreme Court's decision in *Atascadero* by providing an unequivocal expression of Congress's intent to abrogate the states' immunity." *Id.* at 756.

The Tenth Circuit reviewed the legislative record for both Title II of the ADA and Section 504 and found "some evidence * * * that unconstitutional discrimination against the

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[6] The court initially ruled that there was no waiver of immunity because the conditions Congress placed on a State's receipt of federal funds were too broad and therefore coercive. *Bradley*, 189 F.3d at 758. The court reheard that portion of the decision en banc and vacated only that portion of the decision, leaving intact its ruling on the abrogation of sovereign immunity. *Jim C. v. U.S.*, 235 F.3d 1079, 1080 (8th Cir. 2000), *cert. denied sub nom Arkansas Dept. of Education v. Jim C.*, 544 U.S. 949 (2001).

disabled exists in government 'services, programs, or activities.'" *Thompson v. Colorado*, 278 F.3d at 1033. However, the court concluded, "most of those occurrences involve local officials and not the states." *Id.* In addition, many of the examples did not rise to the level of unconstitutional discrimination. *Id.* at 1033–34. As a result of its review, the court concluded that Congress lacked the authority to abrogate the States' sovereign immunity.[7] *See also* Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 89 n. 272 (2001) ("There is no reason to believe that the Rehabilitation Act's legislative history better supports a pattern of state employment discrimination than does that of the ADA Title I.").

The Ninth Circuit stands apart from the other circuits in its refusal to view *Garrett* and its predecessors as setting out the analysis courts must follow when resolving questions of Congress's authority to abrogate States' sovereign immunity. Prior to *Garrett*, the Ninth Circuit rejected Eleventh Amendment immunity claims in both Title II and Section 504 cases. *Dare,* 191 F.3d at 1173–75 (no Eleventh Amendment immunity as to Title II claim); *Clark,* 123 F.3d at 1270 (Eleventh

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[7] Admittedly, the Tenth Circuit's review of the legislative history underlying Title II of the ADA may be in some tension with this Court's review of that history in *Lane.* In that case, this Court noted "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services[.]" 158 L. Ed. 2d at 840. There is some uncertainty in the lower courts as to whether this Court has decided as a matter of law that the legislative record is sufficient as to all public services and programs, or only some, such as access to courthouses and courts. *Miller,* 384 F.3d at 1271 n. 25 (doubting adequacy of record of "a history and pattern of disability discrimination in prisons recited in *Lane*," but nonetheless treating the matter as having been settled in that case).

Amendment does not bar Title II or Section 504 claims). In none of those cases did the Ninth Circuit undertake the kind of review this Court prescribed in *Garrett*. Following *Garrett* and *Lane*, the Ninth Circuit simply adhered to its prior decisions and brushed aside the State's argument that this Court's decisions require a more detailed review of state assertions of Eleventh Amendment immunity to claims brought under Title II and Section 504. See App. 3 ("[A]lthough the State makes a valiant attempt to persuade us that * * * *Garrett* * * * requires us to revisit our precedent, we have already done so and have already rejected the State's claims. * * * We decline further review of our settled precedent."); *see also Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003) (court refused to re-examine its prior holdings regarding the State's sovereign immunity to Title II and Section 504 claims).

For two reasons it is important for this Court to resolve the split between the circuits on the Section 504 immunity issue. First, there is no reason why States in the Ninth Circuit should have less ability to exercise their sovereign immunity than States in the other circuits. Second, the Court should make it clear that the Ninth Circuit should not be free to disregard and fail to apply the analysis that this Court has determined is applicable. As Judge O'Scannlain noted on remand in this case, in the area of Eleventh Amendment immunity, the Ninth Circuit persists in failing to undertake the "more exacting" analysis called for by this Court's case law. *Phiffer*, 384 F.3d at 793.

III. The circuits are split on the effect of Congress's purported waiver, under the Spending Clause power, of State sovereign immunity to Section 504 claims—a split that appears to be based on a conflict between two competing constitutional provisions.

Determining whether a State retains its sovereign immunity to Section 504 claims, after it accepts federal funds,

brings into play two constitutional provisions—the Spending Clause and the Eleventh Amendment. "Each doctrine pulls [a court] in an opposite direction." *Douglas v. California Dept. of Youth Auth.*, 285 F.3d at 1226 (O'Scannlain, J., dissenting from the denial of rehearing en banc). The tension -- which has resulted in a split between the circuits -- arises from the fact that Spending Clause analysis appears to be concerned only with the clear expression of Congress's intent, while Eleventh Amendment analysis looks closely at what the State has done, refusing to lightly imply a waiver of sovereign immunity and necessitating a knowing and intentional waiver of the State's sovereign immunity.

This Court's statements regarding the two provisions have drawn courts in opposite directions and, thus, appear to have led, at least in part, to the circuit split. As explained below, those circuits that have treated the Rehabilitation Act as a condition imposed pursuant to Congress's Spending Clause authority have concluded that the waiver of immunity is a valid condition attached to receipt of federal funds. In contrast, those circuits that have viewed the issue through the lens of this Court's Eleventh Amendment sovereign immunity jurisprudence have asked instead whether States have knowingly and voluntarily waived their immunity. The contrast – and the tension – is between an analysis that focuses on Congress's intent and one that concentrates instead on the knowing and voluntary nature of the State's purported waiver.

Before describing the split among the circuits, it is important to compare what this Court has said about Congress's spending power authority with the Court's decisions regarding waiver of Eleventh Amendment immunity. Under the Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the States. "[O]bjectives not thought to be within Article I's 'enumerated legislative fields,' * * * may neverthe-

less be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), quoting *United States v. Butler*, 297 U.S. 1, 65 (1936).

The Court has identified four limitations on the spending power. First, "[t]he exercise of the spending power must be in pursuit of 'the general welfare[,]'" but courts are to "defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207, quoting *Helvering v. Davis*, 301 U.S. 619, 640–41, 645 (1937). Second, if Congress intends to place a condition on the States' receipt of federal funds, it "must do so unambiguously * * *, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207, quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds," but "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 208, 209 (citations omitted).

In addition to those limitations, Congress may not "induce the States to engage in activities that would themselves be unconstitutional," and "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 210, 211, quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

As discussed below, some circuits have viewed the waiver of Eleventh Amendment immunity to Section 504 claims as a

condition Congress validly has placed on the receipt of federal funds under its spending power authority. In contrast to those decisions, other circuits have focused on the Court's statements regarding Eleventh Amendment immunity in *College Sav. Bank v. Fla. Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999), leading to a very different analysis of the waiver of immunity for Section 504 claims, and a different result.

In *College Savings Bank*, the Court reiterated that, although a State may waive its sovereign immunity, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" 527 U.S. at 675, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). A State's waiver of immunity must be express and unequivocal, and the Court rejected the idea of a constructive waiver of immunity.

> The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. * * * There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity.

College Savings Bank, 527 U.S. at 680–81, quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis in original).

The Court noted that sovereign immunity is constitutionally protected and that waivers of constitutional rights are effective only if the waiver is a knowing and voluntary one. Invoking the "classic description of an effective waiver of a constitutional right [a]s the 'intentional relinquishment or abandonment of a known right or privilege[,]' *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)," the Court emphasized that "every reasonable presumption against waiver" must be applied. *College Savings,* 527 U.S. at 682 (internal quotation marks and additional citations omitted). "State sovereign immunity * * * is constitutionally protected." *Id.* (citations omitted). "And in the context of *federal* sovereign immunity -- obviously the closest analogy * * * -- it is well established that waivers are not implied." *Id.* (emphasis in original; citation omitted). This Court saw "no reason why the rule should be different with respect to state sovereign immunity." *Id.*

The Court also recognized that "congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*of Fla. v. Florida*, 517 U.S. 44 (1996)]." *Id.* at 683. Thus, "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." *Id.*

Although the Court in *College Savings Bank* appears to have endorsed an analysis (later adopted by the Second and Fifth Circuits) that focuses on whether a State has knowingly and voluntarily waived its immunity, the decision did not resolve the issue presented here. The Court left open the door for the analysis followed by some other circuits, which have viewed the waiver instead simply as a condition imposed pursuant to Congress's spending power. The Court recognized Congress's authority, "in the exercise of its spending power, to condition its grant of funds to the States upon their taking

certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions," but the Court concluded that the case was "fundamentally different." That was because "what Congress threaten[ed] if the State refuses to agree to its conditions is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity." *Id.* at 686–87. "[W]here the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – *when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity*." *Id.* (emphasis added).

This case presents the issue left open in *College Savings Bank* and that appears to have resulted in the split between the circuits: when Congress conditions the acceptance of federal funds on the State's waiver of sovereign immunity, is that action reviewed solely as a condition imposed under Congress's spending power or as the waiver of a constitutional right that must be knowing, voluntary and unequivocal? The differing approaches to that question appear to have dictated the differing conclusions reached by the various circuits as they have struggled to resolve the issue.

The Ninth Circuit has viewed the waiver in the Rehabilitation Act simply as an exercise of Congress's spending power.

> One way for a state to waive its immunity is to accept federal funds where the funding statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity."

Clark, 123 F.3d at 1271. Because Congress made its intent clear, the Ninth Circuit concluded that the waiver requirement was valid. *Id.*[8]

In an earlier case, in a dissent to the court's denial of a suggestion for rehearing this issue en banc, Judge O'Scannlain (joined by three of his colleagues) identified the tension between Spending Clause and Eleventh Amendment analysis as a critical issue that the Ninth Circuit (and other courts) have failed to address:

> Courts which must decide whether a State retains its sovereign immunity after accepting conditioned federal funds are caught between two competing lines of jurisprudence. Under the Supreme Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the states. * * * Yet, under the Supreme Court's Eleventh Amendment sovereign immunity jurisprudence, Congress's ability to place affirmative obligations on the States using its Fourteenth Amendment enforcement power is rapidly diminishing. * * * Each doctrine pulls us in an opposite direction.

Douglas, 285 F.3d at 1226 (footnote omitted) (O'Scannlain, J., dissenting). Judge O'Scannlain identified the tension between the two doctrines as being between the requirement that a State's waiver of its sovereign immunity must be made clearly and voluntarily, with a stringent test for finding a waiver, and the countervailing doctrine that Congress may "condition its grant of funds to the States, even by requiring

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[8] In this case, the Ninth Circuit merely reiterated its prior holding in *Clark* that the State waives its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act when it accepts federal funds. App. 3-4.

States to take actions that Congress could not directly require them to take, such as waiving their sovereign immunity." *Id.* at 1228–29, relying on *College Savings Bank* for both propositions.[9]

In contrast to the approach used by the *Douglas* dissent, the Eighth Circuit relied on an analysis similar to that employed by the Ninth Circuit majority in holding that receipt of federal funds waives any immunity to Section 504 claims. *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), *cert. denied sub nom Arkansas Dept. of Education v. Jim C.*, 544 U.S. 949 (2001). The court cited *College Savings Bank*, but only for the proposition that "Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds,

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[9] The tension between Spending Clause analysis and the requirement of a knowing and voluntary waiver of State sovereign immunity also appears to lead to a related division amongst lower courts. When determining whether a state program amounts to a "program or activity receiving Federal financial assistance," under the terms of the Rehabilitation Act, 29 U.S.C. § 794(1)(a), (b)(1)(A), (B), some courts require that the instrumentality of the State to which federal assistance is extended be in a position to accept or reject the federal funds, while others do not. *See Bartlett v. New York State Bd. of Law Examiners,* 156 F.3d 321, 330 (2nd Cir 1998) (determining that there is no such requirement, and distinguishing *U.S. Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 606 (1986)); Annotation, "Who Is Recipient of, and What Constitutes Program or Activity Receiving, Federal Financial Assistance for Purposes of § 504 of the Rehabilitation Act," 160 ALR Fed 297, §§ 10, 11 (2000) (collecting and contrasting cases requiring that State recipient have power to accept or reject federal money, with those which focus instead on Congress's intent that a particular entity receive federal assistance). Again, the tension lies between whether it is Congress's intent that is pivotal or whether instead it is the knowing and voluntary nature of the State's waiver that is determinative.

even though Congress could not order the waiver directly." *Id.* at 1081. The court then relied on the language in *Dole* that "'Congress may attach conditions on the receipt of federal funds.'" *Id.* at 1081, quoting *Dole*, 483 U.S. at 206. The court noted that "[t]o avoid the effect of Section 504" on the state department of education, "the State would be required to sacrifice federal funds only for that department." That "requirement," the court concluded, was "comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved: the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities." "The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice." *Id.* at 1081–82.

The dissent in *Jim C.* criticized the majority for permitting Congress to "achieve indirectly what it cannot constitutionally achieve directly" by an abrogation of the State's immunity. *Id.* at 1082–83 (Bowman, J., dissenting). The dissent concluded that the condition imposed with respect to Rehabilitation Act claims "bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education." *Id.* at 1084. Therefore, it exceeds what Congress may permissibly exact in exchange for federal funds.

The Third Circuit also found the waiver to be effective, looking only at whether Congress, in amending the Rehabilitation Act, made it clear that accepting federal funds results in a waiver of Eleventh Amendment immunity. *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 170 (3rd Cir. 2002) *cert. denied sub nom Pennsylvania Dept. of Corrections v. Koslow*, 537 U.S. 1232 (2003). The court concluded that "where a state participates in a federal financial assistance

program 'in light of the existing state of the law,' the state is charged with awareness that accepting federal funds can result in the waiver of Eleventh Amendment immunity." *Id.* at 172, quoting *Edelman v. Jordan*, 415 U.S. 651, 687 (1974). The Tenth, Eleventh, and District of Columbia Circuits have reached similar decisions based on similar analyses. *Robinson v. Kansas*, 295 F.3d 1183, 1189–90 (10th Cir. 2002), *cert. denied sub nom Kansas v. Robinson*, 537 U.S. 1232 (2003); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *reversed on other grounds, Alexander v. Sandoval*, 532 U.S. 275 (2001); *Barbour v. Washington Metropolitan Transit Auth.*, 374 F.3d 1161 (D.C. Cir. 2004).[10] The court's decision in *Barbour* goes so far as to locate the State's "clear declaration" of its waiver of sovereign immunity solely in Congress's "clear intent to condition participation" in federally funded programs "on a State's consent to waive its constitutional immunity." 374 F.3d at 1163 (internal quotation marks and citation omitted). The court thus conflates completely the clear expression of Congress's intent with a State's intent to waive its sovereign immunity.

Other circuits, however, have focused instead on this Court's emphatic language in *College Savings Bank* that State sovereign immunity is a constitutional right that, like other constitutional rights, can be waived only if the waiver is knowing and voluntary. In *Garcia,* the Second Circuit relied on *College Savings Bank* in reaching its conclusion that the waiver imposed on the receipt of federal funds under Section 504 of the Rehabilitation Act can be valid only if the state "has made a knowing and intentional waiver[.]" 280 F.3d at 114. The Second Circuit criticized the decisions of its sister

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[10] In *Barbour,* the Transit Authority has filed a petition for certiorari, which is pending in this Court. *Washington Metropolitan Transit Authority v. Barbour,* No. 04-748.

circuits as being "unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds." *Id.* at 115 n. 5. "None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank*, 527 U.S. at 682." *Id.*

A panel of the Fifth Circuit took a similar approach in its analysis of the question. Although it recognized that Congress enacted the conditional waiver provision pursuant to its spending power, it, too, required that the State's waiver be knowing and voluntary. *Pace v. Bogalusa City School Board*, 325 F.3d 609, 615–16, *rehearing en banc allowed*, 339 F.3d 348 (5th Cir. 2003). In *Miller v. Texas Tech University Health Sciences Center*, 330 F.3d 691, *rehearing en banc allowed* 342 F.3d 563 (5th Cir. 2003), the court clarified its view of the relationship between conditions imposed under Congress's spending power and waivers of sovereign immunity. It identified "two inquiries" it must make "in determining whether a state has waived its sovereign immunity by accepting federal funds." *Id.* at 694. The first is whether Congress manifested its clear intent to condition participation on a State's waiver of its constitutional immunity. *Id.* The second is whether the state knowingly and voluntarily intended to waive its immunity by accepting funds. *Id.* Although the two inquiries sometimes may overlap, a waiver of a state's sovereign immunity must be a waiver of a known right and every reasonable presumption against a finding of a waiver must be made. *Id.*

Thus, the majority of circuits have focused solely on this Court's statements regarding Congress's authority under the spending power to place conditions on the receipt of federal funds. That approach gives too little regard to the constitu-

tional basis of State sovereign immunity and this Court's equally clear statements that the unequivocal expression of Congress's intent cannot serve as a State's unequivocal, knowing and voluntary expression that it is waiving its sovereign immunity. This case presents the Court with the opportunity to answer an important question that divides the federal circuits and that is of great significance to the States, as well as the federal government.

CONCLUSION

For the reasons discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
Assistant Attorney General
Counsel for Petitioners

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY RAY PHIFFER, an individual,

Plaintiff-Appellee,

v.

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity; SANTIAM CORRECTIONAL INSTITUTE, a State of Oregon public entity,

Defendants-Appellants.

No. 01-35984

D.C. No. CV-01-01652-AJB

ORDER AND AMENDED OPINION

On Remand from the United States Supreme Court

Resubmitted September 3, 2004

Filed September 13, 2004

Amended September 21, 2004

Before: Diarmuid F. O'Scannlain, Ferdinand F. Fernandez, and Raymond C. Fisher, Circuit Judges.

Per Curiam Opinion;

Concurrence by Judge O'Scannlain

SUMMARY

Civil Litigation and Procedure/Appeals

The court of appeals affirmed a judgment of the district court. The court held that it does not require a showing in an interlocutory appeal of Eleventh Amendment immunity that the appeal involves a serious and unsettled question of law. Judge O'Scannlain concurred, writing that it is open to question whether Title II validly abrogates state sovereign immunity where no fundamental right is at issue.

COUNSEL

Janet A. Metcalf, Assistant Attorney General, State of Oregon, for the defendants-appellants.

Dawna F. Scott, Lake Oswego, Oregon, for the plaintiff-appellee.

ORDER

The per curiam opinion filed on September 13, 2004, is amended to include a concurrence by Judge O'Scannlain.

OPINION

PER CURIAM:

On April 21, 2003, we filed a memorandum in this case. 63 Fed. Appx. 335 (9th Cir.2003). The Supreme Court granted certiorari, 124 S. Ct. 2386 (2004), and vacated and remanded for further consideration in light of *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). Upon due consideration, we conclude that our initial resolution of this case is consistent with *Lane's*

holding, and we reissue our original disposition in per curiam form without further amendment.

I

The State appeals the district court's denial of its motion for judgment on the pleadings based on Eleventh Amendment sovereign immunity. The facts and prior proceedings are known to the parties, and are restated herein only as necessary.

II

The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity is an interlocutory appeal and need not await final judgment. *See Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997) ("This court has jurisdiction to hear an interlocutory appeal from an order denying a state's motion to dismiss on the ground of immunity under the Eleventh Amendment." (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993))). The Respondent contends, however, that we must look at each case to determine whether the appeal involves a "serious and unsettled question of law." We disagree. We have never required such a showing for an interlocutory appeal of Eleventh Amendment immunity, *see, e.g., Thomas v. Nakatani*, 309 F.3d 1203, 1206-07 (9th Cir. 2002), nor has the Supreme Court, *see e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and we decline to require such a showing at this time. Accordingly, we have jurisdiction over the State's appeal.

Our precedent clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. *See, e.g., Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark*, 123 F.3d at 1270. And, although the State makes a valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the Uni-*

versity of Alabama v. Garrett, 531 U.S. 356 (2001), requires us to revisit our precedent, we have already done so and have already rejected the State's claims. *See Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), *and cert. dismissed* 2003 WL 1792116 (U.S. April 7, 2003) (No. 02-479); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002) (stating that *Hason* reaffirmed *Clark's* and *Dare's* holding that Congress abrogated sovereign immunity under Title II); *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002) (same). We decline further review of our settled precedent.

Likewise, our precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. *See, e.g., Douglas v. Cal. Dep't of Youth Auth., 271 F.3d 812, 820, as amended,* 271 F.3d 910 (9th Cir. 2001), *and reh'g en banc denied,* 285 F.3d 1226 (9th Cir. 2002). Again, the State points to "intervening Supreme Court precedent," this time *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-76 (1999), which it contends undermines our Eleventh Amendment waiver jurisprudence. Once again, we have already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds. *Vinson v. Thomas,* 288 F.3d 1145, 1151 (9th Cir. 2002) (reaffirming *Douglas's* holding that by accepting federal funds, a state waives its sovereign immunity); *Lovell*, 303 F.3d at 1051 (same). We find the State's claims without merit.

AFFIRMED and REMANDED.

O'SCANNLAIN, Circuit Judge, concurring:

I agree that circuit precedent controls the outcome of this case. *See Dare v. California,* 191 F.3d 1167 (9th Cir. 1999);

Clark v. Woods, 123 F.3d 1267 (9th Cir. 1997). I nevertheless write separately to stress that, even after *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), a palpable tension continues to exist between our circuit's sovereign immunity jurisprudence and the Supreme Court's guidance on this issue. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1191 (9th Cir. 2003) (O'Scannlain, J., concurring); *Hason v. Med. Bd. of Cal.*, 294 F.3d 1166, 1167 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Although the Court held in *Lane* that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity in the context of courthouse access, that narrow holding was reached by a circumspect analysis that is significantly more exacting than that employed by our circuit in *Dare* and *Clark*. 124 S. Ct. at 1994. Indeed, the *Lane* Court placed significant emphasis upon the fact that courthouse access is a fundamental right that implicates not only disabled persons' entitlement to equal protection but also their due process rights and their rights under the First and Sixth Amendments. *See id.* at 1988. It is therefore open to question whether Title II validly abrogates state sovereign immunity where no such fundamental right is at issue. *See id.* at 1994 n.20. A State may well retain its Eleventh Amendment immunity where a plaintiff premises a Title II claim solely upon an alleged equal protection violation and has not suffered the deprivation of any other constitutional right. Because *Dare* and *Clark* upheld the entirety of Title II without engaging in the nuanced, case-by-case analysis demanded by *Lane*, their continued vitality is uncertain. In the absence of en banc review, however, I acknowledge that these decisions remain binding on this panel and thus join in the per curiam opinion.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BILLY RAY PHIFFER,

Plaintiff,

v.

CV 00-1652-BR

DEPARTMENT OF CORRECTIONS COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon public entity, and DEPARTMENT OF CORRECTIONS SANTIAM CORRECTIONAL INSTITUTION, a State of Oregon public entity,

OPINION AND ORDER

Defendants.

DAWNA F. SCOTT
Law Office of Dawna F. Scott
Lakeside Plaza, Suite 300
8 North State Street
Lake Oswego, OR 97034
(503) 636-0400
Attorney for Plaintiff

HARDY MYERS
Attorney General
JOHN CLINTON GEIL
Assistant Attorney General
Department of Justice
1162 Court Street NE

Salem, OR 97310
(503) 378-6313
Attorneys for Defendant

BROWN, Judge.

This matter comes before the Court on Defendants' Motion for Judgment on the Pleadings (#14) as to Plaintiff's First and Second Claims. Plaintiff brought this action alleging Defendants failed to reasonably accommodate his disabilities while he was incarcerated. Plaintiff asserts three claims in his Complaint:

First – Unlawful Discrimination on the Basis of Disability in Violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132;

Second – Unlawful Discrimination on the Basis of Disability in Violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and

Third – Negligence under the Oregon Tort Claims Act (OTCA), Or. Rev. Stat. § 30.265.

Plaintiff seeks injunctive relief, damages, attorneys' fees, and costs. For the purpose of deciding Defendants' Motion, the Court will assume it has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4), and 1367(a).

For the reasons that follow, Defendants' Motion for Judgment on the Pleadings is **DENIED**.

RELEVANT FACTUAL BACKGROUND[1]

[1] This factual summary is taken from Plaintiff's Complaint. For the purpose of Defendants' Motion, the Court has accepted Plaintiff's allegations as true and has drawn all inferences in favor of Plaintiff, the nonmoving party.

Plaintiff is a resident of Texas who formerly was incarcerated in Oregon. From July 1997 to November 1997 and from April 1998 to December 1998, Plaintiff was incarcerated at the Santiam Correctional Institution (SCI). From November 1997 to April 1998, Plaintiff was incarcerated at the Columbia River Correctional Institution (CRCI).

While at CRCI, Plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March 1998 through December 1998, during which time he was returned to SCI. Both the Transitional Mental Health Program and the Pathfinders Program are funded by the federal government.

During his incarceration, Plaintiff suffered from osteoarthritis and osteoporosis. He was unable to sit for the three-hour period, five times a week, required to participate in the Pathfinders Program. Plaintiff requested Defendants to return him to the Transitional Mental Health Program or, alternatively, to reasonably accommodate him for his disabilities. Defendants denied his requests. As a result, Plaintiff suffered severe physical pain while he was enrolled in the Pathfinders Program. Plaintiff contends Defendants were deliberately indifferent to the strong likelihood that their action and/or inaction violated Plaintiff's federally-protected rights.

STANDARDS

Pursuant to Fed. R. Civ. P. 12(c), any party may move for judgment on the pleadings after the pleadings are closed. For purposes of such a motion, the court accepts the nonmoving party's allegations as true and views all inferences in a light most favorable to the nonmoving party. *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1014 (9th Cir. 1998) (citations omitted). A judgment on the pleadings is properly granted when, taking all allegations in the nonmoving party's pleadings as true, the

moving party is entitled to judgment as a matter of law. *See McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997) (citation omitted). *See also Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999).

DISCUSSION

Defendants seek dismissal of Plaintiff's First and Second Claims. In support of their Motion, Defendants contend they are immune from private actions brought under Title II of the ADA and Section 504 of the Rehabilitation Act pursuant to the Eleventh Amendment because they are state government entities. Defendants acknowledge the United States Congress intended to abolish state immunity when Congress enacted the ADA and Section 504; nevertheless, Defendants argue the states are immune under the Eleventh Amendment because Congress exceeded its constitutional authority when it enacted those portions of the Acts.

A. Plaintiff's First Claim under Title II of the ADA

Plaintiff asserts in his First Claim that Defendants violated Title II of the ADA when they failed to reasonably accommodate him for his disabilities and compelled him to participate in the Pathfinders Program. Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The ADA defines "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B).

Defendants base their arguments on a recent decision by the United States Supreme Court in which the Court ruled Congress did not validly abrogate the states' sovereign immunity from actions brought in federal court by private claimants for money damages under Title I of the ADA.[2] *See Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 121 S. Ct. 955, 967-68 (2001). The Court held, therefore, actions brought in federal court by state employees to recover money damages for a state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment. *Id.* Defendants maintain their Motion should be granted because the Court's rationale in *Garrett* applies equally to both of Plaintiff's claims.

Plaintiff counters Defendants' Motion should be denied. Plaintiff relies on *Pennsylvania Dept. of Corrections v. Yeskey* in which the Supreme Court held Title II of the ADA applies to state prisons. 524 U.S. 206, 209-10 (1998). Plaintiff argues the *Garrett* decision did not change the relevant, analytical framework for determining whether Congress validly nullified the states' Eleventh Amendment immunity from actions brought in federal court. Plaintiff also points out before and after *Garrett*, the Ninth Circuit held Congress validly abro-

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[2] Title I of the ADA addresses discrimination in employment and provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

gated state prisons' sovereign immunity from claims brought in federal court under Title II of the ADA and Section 504 of the Rehabilitation Act.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment also precludes citizens from bringing actions in federal court against their own states. *Garrett*, 121 S. Ct. at 962 ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.") (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). Nevertheless, pursuant to its enforcement powers in § 5 of the Fourteenth Amendment, Congress is authorized to abrogate the states' Eleventh Amendment immunity when Congress (1) unequivocally expresses an intent to do so, and (2) acts pursuant to a valid grant of constitutional authority. *Id. See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996).

There is no dispute Congress unequivocally expressed its intent to abrogate the states' immunity from liability for statutory violations when Title II of the ADA was enacted. 42 U.S.C. § 12202 provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State Court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter,

> remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Relying on *Garrett*, however, Defendants maintain Congress acted outside the permissible scope of its constitutional power when it abrogated the states' sovereign immunity for violations of Title II of the ADA. In § 5, the Fourteenth Amendment grants Congress the power to enforce "by appropriate legislation" the substantive guarantees set forth in § 1.[3] *See Garrett*, 121 S. Ct. at 963 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

In *Garrett*, the Court concluded Title I of the ADA, which pertains to public employment, was not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. *Id.* at 968. The Court noted a state is not required to make special accommodations for the disabled if the state's conduct satisfies the minimum "rational-basis" review that courts apply to general social and economic legislation. *Id.* at 963-64. After an examination of the relevant legislative history, the Court determined Congress did not make a finding of "a pattern of irrational state discrimination in employment against

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[3] Section One of the Fourteenth Amendment provides:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

the disabled." *Id.* at 965. Moreover, the Court found the rights and remedies created by Title I of the ADA were not congruent and proportional to any relevant constitutional violations identified by Congress. *Id.* at 966-68.

Defendants argue the Supreme Court's analysis applied to Title I in *Garrett* also applies to Title II. Defendants further assert this Court is bound to follow the Supreme Court's reasoning in *Garrett* and, therefore, must find Defendants immune from liability under Title II. Plaintiff argues the Court did not address Title II in *Garrett*; and, therefore, this Court must follow Ninth Circuit precedent set out in the cases discussed below in which the appellate court established Title II of the ADA is a valid exercise of Congress's constitutional power. The Court agrees with Plaintiff and rejects Defendants' arguments.

Before *Garrett*, the Supreme Court held Title II of the ADA "plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt." *Pennsylvania v. Yeskey,* 524 U.S. at 209 (emphasis in original). Without addressing the constitutional issues raised by Defendants in the case before this Court, the Supreme Court reasoned, "The text of [Title II of] the ADA provides no basis for distinguishing [state prison] programs, services, and activities from those provided by public entities that are not prisons." *Id.* at 210.

In *Garrett*, however, the Court expressly declined to "decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment." 121 S. Ct. at 960 n.1, 966 n.7. The Supreme Court has not determined after *Garrett* whether Title II of the ADA is constitutional; therefore, only Ninth Circuit decisions on that issue bind this Court. The Ninth Circuit has consistently ruled

Title II of the ADA is a valid exercise of Congress's power under § 5.

For instance, in *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), the plaintiffs were state inmates who sought injunctive relief under Title II of the ADA on the grounds they were discriminated against due to their developmental disabilities. The Ninth Circuit applied the two-part test set forth in *Seminole Tribe*, found Title II of the ADA to be a valid exercise of Congress's power under § 5 of the Fourteenth Amendment, and affirmed the district court's decision that the State of California was not immune from liability pursuant to the Eleventh Amendment. *Id.* at 1269-70.

In *Dare v. California*, the Ninth Circuit also held Title II of the ADA is "a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated [the State of California's] Eleventh Amendment immunity." 191 F.3d 1167, 1175 (9th Cir 1999), *cert. denied*, 121 S. Ct. 1187 (2001). The court noted Congress "made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face." *Id.* (citing 42 U.S.C. § 12101(a)). The court reasoned, therefore, "[W]e will not second-guess Congress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities." *Id.* (internal quotations and citation omitted). After *Garrett*, without addressing constitutional issues, the court ruled Title II of the ADA "applies to state prisons." *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citing *Yeskey*, 524 U.S. at 209).

Plaintiff also cites and relies on *Wroncy v. Oregon Department of Transportation,* No. 00-35356, 2001 WL 474550, at *1-2 (9th Cir. Apr. 9, 2001), a Ninth Circuit unpublished, post-*Garrett* decision. Plaintiff contends the Ninth Circuit af-

firmed *Clark* and *Dare* in *Wroncy*. Plaintiff further contends the Ninth Circuit did not reconsider its pre-*Garrett* decision because the Supreme Court expressly declined to reach the constitutionality of Title II in *Garrett*. Defendants point out *Wroncy* might have supported Plaintiff's position if it were a published opinion, but unpublished decisions of the Ninth Circuit are neither persuasive nor controlling authority. *See* 9th Cir. Rule 36-3. *See also Sorchini v. City of Covina*, 250 F.3d 706, 709 (9th Cir. 2001). Accordingly, this Court will not consider *Wroncy* or any other unpublished decision cited by Plaintiff.

In a post-*Garrett* decision, the Ninth Circuit held a claim against a California Senate Committee under Title V of the ADA was barred by the Eleventh Amendment. *See Demshki v. Monteith,* 255 F.3d 986, 988-89 (9th cir. 2001). Title V prohibits discrimination against any individual who opposes an "act or practice made unlawful" by the substantive provisions of the ADA. 42 U.S.C. § 12203(a). In *Demshki*, a former employee alleged he was unlawfully discharged for expressing concern over the Senate Committee's possible violation of relevant law pertaining to disabled job applicants. *Id.* at 987. The Ninth Circuit reasoned:

> We recognize that *Garrett* arose in the context of Title I, but we nevertheless conclude that the Court's holding necessarily applies to claims brought under Title V of the ADA, at least where, as here, the claims are predicated on alleged violations of Title I.

Id. at 988. The Ninth Circuit did not discuss or criticize its prior holdings in *Clark* or *Dare* nor did it address the constitutionality of Title II of the ADA. The *Demshki* decision, therefore, does not alter existing precedent in which the Ninth Circuit has held Title II of the ADA to be a valid exercise of

Congress's power. *See Dare*, 191 F.3d at 1174-75. *See also Clark*, 123 F.3d at 1270.

District courts cannot ignore controlling case authority even if it "appears to rest on reasons rejected in some other line of cases." *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (circuit courts of appeal must follow precedential decisions by the United States Supreme Court), *petition for cert. filed*, 69 U.S.L.W. 3763, 70 U.S.L.W. 3035-36 (U.S. May 21, 200) (Nos. 00-1772, 00-1741, and 00-1754) (internal quotations and citations omitted). *See also Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). This Court must follow Ninth Circuit precedent. *See Yong v. Immigration and Naturalization Service (INS)*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it . . . ."). *See also United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir.) (directly binding decisions must be followed, leaving to the higher court "the prerogative of overruling its own case decisions."), *cert. denied*, 121 S. Ct. 1503 (2001) (internal quotations and citation omitted). Accordingly, this Court finds Plaintiff's First Claim is not deficient as a matter of current law in this circuit, and Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment.

B. Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act.

The parties agree the Court must evaluate a claim brought under Section 504 of the Rehabilitation Act by applying the same two-part test used to determine whether Congress properly abrogated state sovereign immunity when it enacted Title II of the ADA. Defendants concede Section 504 satisfies the first element because Congress clearly and unequivocally ex-

pressed its intention to abolish state immunity under the Eleventh Amendment. The Rehabilitation Act provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). *See also Clark*, 123 F.3d at 1269 ("Congress has unequivocally expressed its intent to abrogate the State's immunity under . . . the Rehabilitation Act.").

The Ninth Circuit evaluated whether Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was "validly enacted under the Fourteenth Amendment." *Id.* at 1270. The Ninth Circuit reasoned, "Congress explicitly found that persons with disabilities have suffered discrimination", and "section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled." *Id.*

In *Clark*, the Ninth Circuit also held a state's acceptance of Rehabilitation Act funds creates an express waiver of the state's immunity under the Eleventh Amendment in a discrimination action under Section 504 of the Rehabilitation Act. *Id.* at 1271.

Plaintiff alleges in his Complaint the Transitional Mental Health Program and the Pathfinders Program were wholly or partially funded through federal financial assistance. Viewing Plaintiff's allegations as true at this stage of the proceedings, the Court concludes Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate these state programs. Accord-

ingly, Defendants' Motion to Dismiss Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act is denied.

CONCLUSION

Based on the foregoing, Defendants' Motion for Judgment on

the Pleadings (#14) is **DENIED**.

IT IS SO ORDERED.

Dated this 17th day of September, 2001.

/s/Anna J. Brown

ANNA J. BROWN
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY RAY PHIFFER, an individual,

Plaintiff-Appellee,

v.

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Defendants-Appellants.

No. 01-35984

D.C. No. CV-01-01652-AJB

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted March 6, 2003**
Portland, Oregon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judges

The State appeals the district court's denial of its motion for judgment on the pleadings based on Eleventh Amendment sovereign immunity. The facts and prior proceedings are known to the parties, and are restated herein only as necessary.

The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity is an interlocutory appeal and need not await final judgment. *See Clark v. California,* 123 F.3d 1267, 1269 (9th Cir. 1997) ("This court has jurisdiction to hear an interlocutory appeal from an order denying a state's motion to dismiss on the ground of immunity under the Eleventh Amendment." (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993))). The Respondent contends, however, that we must look at each case to determine whether the appeal involves a "serious and unsettled question of law." We disagree. We have never required such a showing for an interlocutory appeal of Eleventh Amendment immunity, *see, e.g., Thomas v. Nakatani*, 309 F.3d 1203, 1206-07 (9th Cir. 2002), nor has the Supreme Court, *see, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993), and we decline to require such a showing at this time. Accordingly, we have jurisdiction over the State's appeal.

Our precedent clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. *See, e.g., Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark*, 123 F.3d at 1270. And, although the State makes a valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), requires us to revisit our precedent, we have already done so and have already rejected the State's claims. *See Hason v. Med. Bd. of*

Cal., 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), *and cert. dismissed* 2003 WL 1792116 (U.S. April 7, 2003) (No. 02-479); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002) (stating that *Hason* reaffirmed *Clark*'s and *Dare*'s holding that Congress abrogated sovereign immunity under Title II); *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002) (same). We decline further review of our settled precedent.

Likewise, our precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. *See, e.g., Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 820, *as amended*, 271 F.3d 910 (9th Cir. 2001), *and reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002). Again, the State points to "intervening Supreme Court precedent," this time *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-76 (1999), which it contends undermines our Eleventh Amendment waiver jurisprudence. Once again, we have already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds. *Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002) (reaffirming *Douglas*'s holding that by accepting federal funds, a state waives its sovereign immunity); *Lovell*, 303 F.3d at 1051 (same). We find the State's claims without merit.

AFFIRMED and REMANDED.

MEMORANDUM CASES

No. 03-279. Columbia River Correctional Institute, et al., Petitioners v. Billy Ray Phiffer.

May 24, 2004. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Tennessee v. Lane, 541 US ___, 158 L Ed 2d 820, 124 S Ct ____ (2004).